Petition

81-1067

No.

Office - Supreme Court, U.S.
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ALEXANDER L. STEVAS,

In The

Supreme Court of the United States

October Term, 1981

SMITH'S MOVING AND TRUCKING COMPANY and GEORGE G. SMITH, individually and as President of Smith's Moving and Trucking Company and on behalf of all others similarly situated,

Petitioners,

vs.

DOROTHY SVENDSEN, individually, and on behalf of all others similarly situated,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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5942

QUESTIONS PRESENTED FOR REVIEW

1. Can a finding by the New York Court of Appeals that Sec. 7-210(2) of the New York Uniform Commercial Code is repugnant to the New York Constitution's Due Process Clause stand if the same Sec. 7-210(2) was found earlier by this Court in *Flagg Brothers, Inc. v. Brooks,* 436 U.S. 149 (1978), not to be repugnant to the United States Constitution's Due Process Clause?

2. Does a decision of the New York Court of Appeals which extinguishes a right of extrajudicial sale by a warehouseman provided for in a contract between a private storage depositor and warehouseman pursuant to the terms of a state statute authorizing such provisions in storage contracts impair the obligation of contract in violation of Article I, Sec. 10 of the United States Constitution?

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No.

In The

Supreme Court of the United States

October Term, 1981

SMITH'S MOVING AND TRUCKING COMPANY and GEORGE G. SMITH, individually and as President of Smith's Moving and Trucking Company and on behalf of all others similarly situated,

Petitioners,

vs.

DOROTHY SVENDSEN, individually, and on behalf of all others similarly situated,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioners Smith's Moving and Trucking Company and George G. Smith respectfully pray that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York which affirmed an order of the Appellate Division of the New York State Supreme Court, Second Department, declaring Sec. 7-210(2) of the New York Uniform Commercial Code unconstitutional as violative of the Due Process Clause of the Constitution of the State of New York.

OPINIONS BELOW

The opinion of the New York Court of Appeals has not yet been reported. It is set forth in full in the Appendix beginning at p. 3a. The opinion of the Appellate Division of the New York State Supreme Court, Second Department is reported at 76 App. Div. 2d 504 (2d Dep't, 1980) and is set forth in full in the Appendix beginning at page 6a. The opinion of the New York State Supreme Court has not been reported. It is set forth in full in the Appendix beginning at p. 14a.

JURISDICTION

The memorandum decision of the New York Court of Appeals was made and entered on October 13, 1981, and a copy thereof is set forth in the Appendix at p. 3a. The judgment of the New York State Supreme Court incorporating the provisions of the Court of Appeals memorandum decision was entered on October 29, 1981, and a copy thereof is set forth in the Appendix at p. 1a. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Appended to the Petition beginning at p.17a of the Appendix are the following relevant constitutional provisions and statutes: Article I, Section 10 of the United States Constitution; Amendment XIV, Section 1 to the United States Constitution (in part); Article I, Section 6 of the New York State Constitution; Section 7-210, Subd. (2) of the New York Uniform Commercial Code; and Article 29-I of the New York General Business Law.

STATEMENT OF THE CASE

This case involves the constitutionality of a warehouseman's right to enforce his lien for default in payment of his charges in conformity with Sec. 7-210(2) of the New York Uniform Commercial Code. This code provision is substantially the same in 49 states and in the District of Columbia.

Petitioners are the defendant moving and household warehouseman company and its owner. Respondent is a former bailor of stored household goods.

Respondent's household goods were picked up by, and stored with, petitioner warehouseman following a court eviction of respondent from her apartment. In the course of the storage service, respondent failed to pay the charges thereby incurred and the warehouseman sold the contents at public auction.

An action was commenced by respondent in New York State Supreme Court, Westchester County, for a declaration that Sec. 7-210(2) of the New York Uniform Commercial Code was unconstitutional and money damages. The trial court granted petitioner warehouseman summary judgment on the constitutional issue on the authority of this Court's holding in *Brooks v. Flagg, supra.* The Appellate Division of the New York State Supreme Court reversed and declared the statute unconstitutional citing *Sharrock v. Dell-Buick Cadillac,* 45 N.Y. 2d 159 (1978). That case construed the sale provision of the New York garageman's lien statute to be violative of the New York State Constitution Due Process Clause. The New York Court of Appeals affirmed, holding *Sharrock v. Dell-Buick* to be *stare decisis. Sharrock* was decided by the New York Court of Appeals on July 11, 1978; *Flagg v. Brooks* was decided by this Court on May 15, 1978.

REASONS FOR GRANTING THE WRIT

I.

The decision of the New York Court of Appeals is in direct conflict with a decision of the United States Supreme Court interpreting the same uniform statute against a substantially identical constitutional provision under a substantially identical factual situation.

Sec. 7-210(2) of the New York Uniform Commercial Code permits a warehouseman to sell at auction the goods of a delinquent paying depositor after strict safeguards have been complied with. The constitutionality of that statute was challenged in this Court in *Flagg Brothers, Inc. v. Brooks, supra.* The claim of the federal due process violation was not sustained in *Flagg,* as requisite state action was lacking.

The instant case was commenced under a replica fact situation again challenging the constitutionality of Sec. 7-210(2) upon the ground that New York State constitutional due process was violated.

Both constitutional Due Process Clauses are couched in strikingly similar language.

The New York Court of Appeals in *Central Savings Bank v. City of New York,* 280 N.Y. 9, 10 (1939) has noted:

> "The clauses are formulated in the same words and are intended for the protection of the same rights of the individual and there is logically no room for distinction in definition of the scope of the two clauses."

The existence of the same constitutional language safeguarding the same right raises the question as to whether a state court can construe due process language in its own Constitution in a manner inconsistent with the holding of this Court thereby declaring a uniform state statute to be unconstitutional notwithstanding a finding by this Court that such statute meets the constitutional test.

II.

The New York Court of Appeals decision impairs the obligation of contract between storage depositor and warehouseman.

During the pendency of the appeals in this case through the New York judicial system, New York General Business Law §607(h) was enacted which required that as a condition to the existence of a right to sell pursuant to a warehouseman's lien a storage contract first be executed by the parties containing all the material terms of the transaction. The warehouseman's right to foreclose his lien is a material term which has to be set forth in the contract thus becoming a matter of private agreement.

This argument was raised by petitioners on appeal to the New York Court of Appeals and was disposed of by that Court by saying that the statutory provision "did not proscribe the summary non-judicial sale permitted by U.C.C. Sec. 7-210, which under the reasoning of *Sharrock* is clearly unconstitutional." (Appendix at p. 4a).

The effect of this pronouncement is that the New York Court of Appeals, in a summary statement without explanation, has extinguished a contractual right of extrajudicial sale which *by state law* as a material term must be inserted in all storage contracts entered into in New York State since the effective date of the statute on October 10, 1979. Thus, in New York State, the warehouseman

has been deprived of a contractual right of sale leaving him with resort to a plenary action with attendant expenses to free his unproductive warehouse space.

Similarly, storage depositors have entered into right of sale provisions in storage contracts to induce warehousemen in the event of default to look to the property to satisfy the lien. The New York decision requires the warehouseman to obtain a money judgment against the depositor. The New York decision impairs the right of sale provision important to warehouseman and depositor alike.

CONCLUSION

The New York Court of Appeals decision is in direct conflict with the decision of this Court in *Flagg Brothers, Inc. v. Brooks.* It should be reviewed to resolve this conflict.

The New York decision further raises a serious question as to whether it impairs a contractual obligation.

For the foregoing reasons, the petition for a writ of certiorari to the New York Court of Appeals should be granted.

Respectfully submitted,

ALVIN ALTMAN
Attorney for Petitioners

JAMES C. McMAHON, JR.
BRODSKY, LINETT, ALTMAN,
SCHECTER & REICHER
Of Counsel

APPENDIX

JUDGMENT OF THE SUPREME COURT OF THE STATE OF NEW YORK DATED OCTOBER 27, 1981

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF WESTCHESTER

Index No. 10311/79

DOROTHY SVENDSEN, individually and on behalf of all others similarly situated,

Plaintiffs,

-against-

SMITH'S MOVING AND TRUCKING COMPANY, and GEORGE G. SMITH, individually and as President of Smith's Moving and Trucking Company, and on behalf of all others similarly situated,

Defendants.

The defendants, SMITH'S MOVING AND TRUCKING COMPANY, and GEORGE G. SMITH, having appealed to the State of New York Court of Appeals from an Order of the Appellate Division of the Supreme Court, Second Judicial Department, entered in that Court on August 18, 1980, which Order declared that section 7-210 (subd. [2]) of the New York Uniform Commercial Code was unconstitutional to the extent that it authorizes the ex parte sale of bailed goods, without first affording the lienee the opportunity for a hearing, and said appeal having come on to be heard before the Court of Appeals pursuant

to an Order of said Appellate Division entered on December 18, 1980, which granted the defendants' motion for leave to appeal to the Court of Appeals and certified a question of law to said Court, to wit, "Was the order of this court, dated August 18, 1980, properly made?", and the Court of Appeals having duly made an Order entered on October 13, 1980, which affirmed the Order appealed from, with costs, and answered the question certified by the Appellate Division in the affirmative, a copy of which order, together with the record on appeal, was remitted to and filed in the office of the Clerk of the County of Westchester on the [sic] day of October, 1981,

NOW, on motion of Brodsky, Linett, Altman, Schechter & Reicher, attorneys for the defendants, it is

ADJUDGED, that the Order of the Appellate Division entered on the 18th day of August, 1980, be and the same hereby is in all respects affirmed; and it is further

ADJUDGED, that the plaintiff Dorothy Svendsen, residing at 101 Maple Avenue, White Plains, New York 10601, recover of the defendants, residing at 20-D Bank Street, White Plains, New York, the sum of One Hundred Twenty-Five and 00/100 Dollars ($125.00), such being the statutory costs to which plaintiff is entitled pursuant to Section 8204 of the New York Civil Practice Law and Rules, and that the plaintiff have execution therefor.

Judgment signed and entered this 17th day of October, 1981.

s/ George R. Morrow, Jr.
Clerk

MEMORANDUM DECISION DATED OCTOBER 13, 1981

STATE OF NEW YORK

COURT OF APPEALS

2 No. 421

Dorothy Svendsen, &c.,

Respondent,

v.

Smith's Moving and Trucking Company et al.,

Appellants.

(421) Alvin Altman & James C. McMahon, Jr., NYC, for appellants.

Martin A. Schwartz & Virginia Knaplund, White Plains, for respondent.

The order of the Appellate Division should be affirmed, with costs, for the reasons stated in the Per Curiam opinion of that court (76 AD2d 504). In response to appellant's arguments advanced before us, we add the following observations: (1) the mandate of the due process clause of the New York State Constitution (Article I, Section 6), because it is a constitutional provision, takes precedence over the uniformity provision of the Uniform Commercial Code (UCC §1-102, subd [2][c]; (2) the 1980 amendment of Article 9 of the Lien Law in an effort to correct the constitutional infirmity in the garagemen's lien which we recognized in *Sharrock v Dell Buick Cadillac,* (45 NY2d 152) is

irrelevant to the issue of the present case, because Article 9 specifically excepts from its provisions the lien of a warehouseman under the UCC and no similar legislative amendment with respect to the latter lien has been enacted; and (3) the 1979 enactment of the Truth-In-Storage Act (Article 29-I of the General Business Law), if it be applicable at all to the instant non-contractual situation, does not proscribe the summary non-judicial sale permitted by UCC Section 2-710, which under the reasoning of *Sharrock* is clearly unconstitutional.

JASEN, J. (concurring):

Stare decisis impels me to concur with the majority in declaring section 7-210 of the Uniform Commercial Code unconstitutional (*Sharrock v Dell Buick-Cadillac,* 45 NY2d 152), notwithstanding that this very warehouseman's lien foreclosure provision was recently upheld by the Supreme Court in *Flagg Bros. v Brooks* (436 US 149).

It is troublesome that this court's ruling, applicable only in this State, will affect the uniformity of commercial lien law as it exists throughout our nation. To the extent it will affect the Uniform Commercial Code, this holding undermines a part of that statute on the basis of a single State's constitutional vagary in interpretation of the due process clause. It also vitiates a prior holding of our court in interpreting the Federal and State due process clauses. We said in *Central Savings Bank v City of New York* (280 NY 9, 10): "The clauses are formulated in the same words and are intended for the protection of the same fundamental rights of the individual and there is, logically, no room for distinction in definition of the scope of the two clauses."

Since the Legislature has seen fit to reform the Lien Law in light of this court's decision in *Sharrock* (Lien Law §201-a), it may

wish to consider proper legislation to reform the warehouseman's lien provision in light of this decision in order to again bring New York into the main stream of commercial law.

****

Order affirmed, with costs, in a memorandum. Question certified answered in the affirmative. All concur, Jasen, J., in a concurring opinion.

Decided October 13, 1981

OPINION OF THE APPELLATE DIVISION DATED AUGUST 18, 1980

SUPREME COURT : APPELLATE DIVISION

SECOND JUDICIAL DEPARTMENT

HOPKINS, J.P., RABIN, COHALAN and WEINSTEIN, JJ.

DOROTHY SVENDSEN, etc.,

appellant,

-against-

SMITH's MOVING AND TRUCKING COMPANY, et al.,

respondents.

APPEAL from an order of the Supreme Court at Special Term (WILLIAM A. WALSH, JR., J.), dated January 24, 1980 and entered in Westchester County, which denied plaintiff's motion for summary judgment (except as to damages) and for class action certification.

Westchester Legal
Services, Inc.,
White Plains, N.Y.
(Martin A. Schwartz
and Virginia Knaplund
of counsel), for appellant.

P E R CURIAM. At issue is the constitutionality of subdivision (2) of section 7-210 of the Uniform Commercial Code insofar as

it authorizes the ex parte sale of the bailed goods, without first affording the lienee the opportunity for a hearing.

Plaintiff, Dorothy Svendsen, was evicted from her rented apartment pursunt to a judgment and warrant of eviction. Under the direction of the City Marshall, her belongings were removed by Smith's Moving and Trucking Company to its warehouse for storage. She alleges that she neither authorized nor contracted with said defendant to remove or store her possessions. After the initial payment of the moving and storage charges by the Westchester County Department of Social Services, plaintiff began to receive bills for monthly storage charges. The charges accumulated and plaintiff eventually received a notice of sale from the defendants. The notice informed her that defendants had imposed a warehouseman's lien upon her goods pursuant to section 7-210 of the Uniform Commercial Code and intended to seek enforcement. Additionally, it stated that the failure by plaintiff to pay the charges due by a certain date would result in the sale of her possessions. Plaintiff contacted the defendants and informed them of the value of her possessions. Subsequent telephone calls were not returned. After being unable to ascertain the status of her possessions, plaintiff consulted counsel who discovered that most of her belongings had been sold. Plaintiff was never given an opportunity to contest the lien or the sale at a hearing.

As a result of the sale of her possessions, plaintiff brought this action seeking declaratory and injunctive relief and damages on the ground that section 7-210 violates the State's due process clause (NY Const, art I, §6). After issue was joined (the Attorney-General declined to intervene), plaintiff moved for class action certification and summary judgment (except as to damages). Special Term, relying on *Jones v Banner Moving & Stor.* (48 AD2d 928), denied class action certification and also denied plaintiff's

motion for summary judgment on the ground that a determination favorable to her on the requests for nonconstitutional relief would obviate resolution of the constitutional issue. For the reasons stated below, we modify the order of Special Term and declare that section 7-210 of the Uniform Commercial Code is unconstitutional.

The *Jones* rationale does not apply in this case. Although *Jones* involved a similar challenge to the statutory provisions governing the ex parte enforcement of a warehouseman's lien, the *Jones* complaint included several nonconstitutional causes of action which would afford the same relief. However, the gravamen of this action is the due process claim and the relief requested is based solely upon a finding of unconstitutionality. No alternative causes of action appear in the complaint. Nor are there any factual issues which must be developed prior to reaching the due process question. Therefore, the substantive issue of whether 7-210 (subd [2]) is constitutional, should have been reached (see *Sharrock v Dell Buick-Cadillac,* 56 AD2d 446, affd 45 NY2d 152, which entailed a virtually identical challenge to the constitutionality of the garageman's lien [Lien Law, §§200-202, 204]).

On such consideration, we conclude that the provisions of subdivision (2) of section 7-210 of the Uniform Commercial Code, which authorize the ex parte foreclosure of a warehouseman's lien, violate the due process clause of the Constitution of the State of New York (NY Const, art I, §6) because they fail to afford the lienee the opportunity for a hearing. *Sharrock v Dell Buick-Cadillac (supra),* which involved a similar challenge to the analogous procedures for enforcing a garageman's lien (Lien Law, §§200-202, 204), is dispositive of this action. Both the garageman's and warehouseman's liens permit the enforcement of a valid possessory lien by an ex parte nonjudicial sale of the debtor's property without affording the debtor an opportunity to be heard (compare Lien

Law, §§200-202, 204 with Uniform Commercial Code, §7-210). By these provisions, New York State has extended creditor's rights beyond the common law and "has so entwined itself into the debtor-creditor relationship as to constitute sufficient and meaningful State participation which triggers the protections afforded by our Constitution" (*Sharrock v Dell Buick-Cadillac,* 45 NY2d at p 161, *supra;* see, also, *Blye v Globe-Wernicke Realty Co.,* 33 NY2d 15). In addition, the procedure allowing the ex parte foreclosure of a warehouseman's lien is a delegation to the warehouseman of the "exclusive power of the sovereign to resolve disputes" (*Sharrock v Dell Buick-Cadillac, supra,* p. 162). Such a delegation is sufficient to involve the due process protections guaranteed by the New York Constitution (art I, §6).

As in *Sharrock,* the State's authorization of ex parte foreclosure of the warehouseman's lien is violative of State due process as it deprives debtors of a significant property interest without a prior opportunity to be heard (see *Sharrock v Dell Buick-Cadillac, supra,* pp 163-167). The similarities between the statute in *Sharrock* and at bar compel this result (see *id.* at pp 159, 174 [JASEN, J., dissenting]; see, also, The Constitutionality of New York's Garageman's Lien: A "Flexible" State Action Concept Under the State Due Process Clause, 43 Alb L Rev 121, 132). Nor do the factual differences between how garagemen's liens and warehousemen's liens may arise suggest a viable basis for distinction. Both essentially entail the sale of valuable personal property without giving the debtor the opportunity to be heard or otherwise challenge the validity of the lien. The decision in *Flagg Bros. v Brooks* (436 US 149), in which the same warehouseman's lien provisions survived a Federal due process challenge, does not alter this result, since our determination is necessarily based upon the due process clause contained in the New York State

Constitution as construed by the Court of Appeals in *Sharrock v Dell Buick-Cadillac (supra).*

Finally, Special Term's denial of class action status was not an abuse of discretion. Subsequent complainants will be adequately protected under the principle of *stare decisis* (see *Matter of Jones v Berman,* 37 NY2d 42; *Matter of Rivera v Trimarco,* 36 NY2d 747; *Sharrock v Dell Buick-Cadillac,* 56 AD2d 446, affd 45 NY2d 152, *supra*).

HOPKINS, J.P., RABIN, COHALAN and WEINSTEIN, JJ., concur.

ORDER DENYING MOTION FOR SUMMARY JUDGMENT AND CLASS ACTION ORDER DATED JANUARY 24, 1980

At a Special Term, Part I, of the Supreme Court, held in and for the County of Westchester, at the County Courthouse in the City of White Plains, on the 24th day of January, 1980.

Index No. 10311/79

Filed Jan. 28, 1980

Present:

Hon. William A. Walsh, Jr.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

DOROTHY SVENDSEN, individually and on behalf of all others similarly situated,

Plaintiffs,

-against-

SMITH'S MOVING AND TRUCKING COMPANY, and GEORGE G. SMITH, individually and as President of Smith's Moving and Trucking Company, and on behalf of all others similarly situated,

Defendants.

Order

Plaintiffs, having moved this Court by notice of motion dated October 16, 1979, for an order determining the within action to be a proper plaintiff and defendant class action pursuant to Article 9 of the New York Civil Practice Law and Rules and for an order and judgment granting plaintiffs summary judgment pursuant to New York Civil Practice Law and Rules, 3212 for all of the relief prayed for in the complaint except the amount of damages to which plaintiff is entitled, and said motion having regularly come on to be heard on the 26th day of October, 1979, and counsel for plaintiffs having made an oral application to the Court on the 26th day of October, 1979, requiring that the Attorney General appear in this action pursuant to section 71 of the New York Executive Law and section 1012(b) of the Civil Practice Law and Rules,

NOW, upon reading and filing the notice of motion for a class action order and summary judgment and the affidavits and exhibits in support thereof, the pleadings, and plaintiffs' memorandum of law in support of motion for class action order and for summary judgment, and after hearing Martin A. Schwartz, Esq., attorney for the plaintiffs in support of this motion, and due deliberation having been had, and the Court having rendered its decision on the 10th day of January, 1980, determining to deny plaintiffs' motions in all respects, it is

ORDERED that plaintiffs' motion for summary judgment for all of the relief prayed for in the complaint except the amount of damages to which plaintiff is entitled be and the same hereby is in all respects denied; and it is further

ORDERED that plaintiffs' motion for an order determining the within action to be a proper plaintiff and defendant class action be and hereby is in all respects denied.

Order

Enter:

s/ Hon. William A. Walsh, Jr.
Hon. William A. Walsh, Jr.
Justice of the Supreme Court

OPINION OF NEW YORK SUPREME COURT DATED JANUARY 10, 1980

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

Index No. 10311/79

DOROTHY SVENDSEN, individually and on behalf of all others similarly situated,

Plaintiffs,

-against-

SMITH'S MOVING AND TRUCKING COMPANY, and GEORGE G. SMITH, individually and as President of Smith's Moving and Trucking Company, and on behalf of all others similarly situated,

Defendants.

HON. WILLIAM A. WALSH, JR.,

Plaintiff moves for a class action order and for summary judgment.

Plaintiff was the lessee of an apartment in a White Plains apartment house. She was evicted therefrom in 1975 pursuant to judgment and warrant of eviction issued by the White Plains City Court. The judgment and warrant were executed by the City Marshall who was accompanied by defendant George Smith. Plaintiff was informed that her furniture and possessions were to be removed by Mr. Smith and stored in his warehouse.

Opinion

Plaintiff received monthly storage bills from defendant company. A "Sale Notice" was received by her on or about February 27, 1976. Apparently, some of plaintiff's furniture and possessions were sold at public auction.

This motion for summary judgment is predicated upon the alleged unconstitutionality of section 7-210 of the Uniform Commercial Code which permits enforcement of a warehouseman's lien by public or private sale.

The Attorney General, by letter to the Court dated November 20, 1979, indicated that a decision was made not to intervene in the action.

In *Jones v. Banner Moving and Storage,* 48 AD 2d 928, the Appellate Division, Second Department was confronted with the precise question presented here. A motion for summary judgment had been granted by Special Term upon a finding that sections 7-209, 7-210 of the Uniform Commercial Code were unconstitutional.

The *Jones* court modified the Supreme Court order by striking decretal paragraphs therefrom and denying the motion for summary judgment. The court declared at page 929:

> ". . . Despite causes of action for return of her goods and for monetary damages, plaintiff moved for partial summary judgment with respect only to that portion of the complaint which asked for judgment declaring sections 7-209 and 7-210 of the Uniform Commercial Code unconstitutional as violative of the requirements of due process both on their face and as applied to plaintiff. These

> sections deal with the retention and enforcement provisions of the warehouseman's lien. On this state of the record, any determination with respect to the constitutionality of the warehouseman's lien is premature . . . Resolution of the constitutional issue would be obviated by a determination favorable to plaintiff on the cause of action to recover possession of the chattels. Such disposition would be much preferable to a determination on constitutional grounds . . ."

Here, in addition to constitutional grounds, the complaint seeks judgment for an award of damages caused by the summary sale of plaintiff's household goods and furniture, and injunctive relief enjoining defendants from disposing of other property belonging to plaintiff without affording plaintiff a prior hearing. A determination favorable to plaintiff with respect to those claims would obviate resolution of the constitutional issue.

A class action is inappropriate under the circumstances herein.

The motion is in all respects denied.

Submit order on notice.

Dated: White Plains, New York
January 10, 1980

s/ William A. Walsh, Jr.
J. S. C.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Article I, §10:

> SECTION 10. No State Shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

United States Constitution, Amendment 14:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

New York State Constitution, Article I, §6:

> §6. [Grand jury; right to counsel; informing accused; double jeopardy; self-incrimination; waiver of immunity by public officers; due process of law]

Relevant Constitutional and Statutory Provisions

No person shall be held to answer for a capital or otherwise infamous crime (except in cases of impeachment, and in cases of militia when in actual service, and the land, air and naval forces in time of war, or which this state may keep with the consent of Congress in time of peace, and in cases of petit larceny, under the regulation of the legislature), unless on indictment of a grand jury, and in any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions and shall be informed of the nature and cause of the accusation and be confronted with the witnesses against him. No person shall be subject to be twice put in jeopardy for the same offense; nor shall he be compelled in any criminal case to be a witness against himself, providing, that any public officer who, upon being called before a grand jury to testify concerning the conduct of his present office or of any public office held by him within five years prior to such grand jury call to testify, or the performance of his official duties in any such present or prior offices, refuses to sign a waiver of immunity against subsequent criminal prosecution, or to answer any relevant question concerning such matters before such grand jury, shall by virtue of such refusal, be disqualified from holding any other public office or public employment for a period of five years from the date of such refusal to sign a waiver of immunity against subsequent prosecution, or to answer any relevant question concerning such matters before such grand jury, and shall be removed from his

present office by the appropriate authority or shall forfeit his present office at the suit of the attorney-general.

The power of grand juries to inquire into the wilful misconduct in office of public officers, and to find indictments or to direct the filing of informations in connection with such inquiries, shall never be suspended or impaired by law.

No person shall be deprived of life, liberty or property without due process of law. (Emphasis added.) Amended Nov. 8, 1938; Nov. 8, 1949; Nov. 3, 1959, eff. Jan. 1, 1960.

New York Uniform Commercial Code:

§7-209. Lien of Warehouseman

(1) A warehouseman has a lien against the bailor on the goods covered by a warehouse receipt or on the proceeds thereof in his possession for charges for storage or transportation (including demurrage and terminal charges), insurance, labor, or charges present or future in relation to the goods, and for expenses necessary for preservation of the goods or reasonably incurred in their sale pursuant to law. If the person on whose account the goods are held is liable for like charges or expenses in relation to other goods whenever deposited and it is stated in the receipt that a lien is claimed for charges and expenses in relation to other goods, the warehouseman also has a lien against him for

such charges and expenses whether or not the other goods have been delivered by the warehouseman. But against a person to whom a negotiable warehouse receipt is duly negotiated a warehouseman's lien is limited to charges in an amount or at a rate specified on the receipt or if no charges are so specified then to a reasonable charge for storage of the goods covered by the receipt subsequent to the date of the receipt.

(2) The warehouseman may also reserve a security interest against the bailor for a maximum amount specified on the receipt for charges other than those specified in subsection (1), such as for money advanced and interest. Such a security interest is governed by the Article on Secured Transactions (Article 9).

(3) A warehouseman's lien for charges and expenses under subsection (1) or a security interest under subsection (2) is also effective against any person who so entrusted the bailor with possession of the goods that a pledge of them by him to a good faith purchaser for value would have been valid but is not effective against a person as to whom the document confers no right in the goods covered by it under section 7—503.

(4) A warehouseman loses his lien on any goods which he voluntarily delivers or which he unjustifiably refuses to deliver. L.1962, c.553, eff. Sept. 27, 1964.

Relevant Constitutional and Statutory Provisions

New York Uniform Commercial Code:

§7-210. Enforcement of Warehouseman's Lien

(1) Except as provided in subsection (2), a warehouseman's lien may be enforced by public or private sale of the goods in bloc or in parcels, at any time or place and on any terms which are commercially reasonable, after notifying all persons known to claim an interest in the goods. Such notification must include a statement of the amount due, the nature of the proposed sale and the time and place of any public sale. The fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the warehouseman is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner. If the warehouseman either sells the goods in the usual manner in any recognized market therefor, or if he sells at the price current in such market at the time of his sale, or if he has otherwise sold in conformity with commercially reasonable practices among dealers in the type of goods sold, he has sold in a commercially reasonable manner. A sale of more goods than apparently necessary to be offered to insure satisfaction of the obligation is not commercially reasonable except in cases covered by the preceding sentence.

(2) A warehouseman's lien on goods other than goods stored by a merchant in the course of his business may be enforced only as follows:

(a) All persons known to claim an interest in the goods must be notified.

(b) The notification must be delivered in person or sent by registered or certified letter to the last known address of any person to be notified.

(c) The notification must include an itemized statement of the claim, a description of the goods subject to the lien, a demand for payment within a specified time not less than ten days after receipt of the notification, and a conspicuous statement that unless the claim is paid within that time the goods will be advertised for sale and sold by auction at a specified time and place.

(d) The sale must conform to the terms of the notification.

(e) The sale must be held at the nearest suitable place to that where the goods are held or stored.

(f) After the expiration of the time given in the notification, an advertisement of the sale must be published once a week for two weeks consecutively in a newspaper of general circulation where the sale is to be held. The advertisement must include a description of the goods, the name of the person on whose account they are being held, and the time and place of the sale. The sale must take place at least fifteen days after the first publication. If there is no newspaper of general circulation

where the sale is to be held, the advertisement must be posted at least ten days before the sale in not less than six conspicuous places in the neighborhood of the proposed sale.

(3) Before any sale pursuant to this section any person claiming a right in the goods may pay the amount necessary to satisfy the lien and the reasonable expenses incurred under this section. In that event the goods must not be sold, but must be retained by the warehouseman subject to the terms of the receipt and this Article.

(4) The warehouseman may buy at any public sale pursuant to this section.

(5) A purchaser in good faith of goods sold to enforce a warehouseman's lien takes the goods free of any rights of persons against whom the lien was valid, despite noncompliance by the warehouseman with the requirements of this section.

(6) The warehouseman may satisfy his lien from the proceeds of any sale pursuant to this section but must hold the balance, if any, for delivery on demand to any person to whom he would have been bound to deliver the goods.

(7) The rights provided by this section shall be in addition to all other rights allowed by law to a creditor against his debtor.

(8) Where a lien is on goods stored by a merchant in the course of his business the lien may be enforced in accordance with either subsection (1) or (2).

(9) The warehouseman is liable for damages caused by failure to comply with the requirements for sale under this section and in case of willful violation is liable for conversion. L.1962, c. 553; amended L.1963, c. 1003, §15, eff. Sept. 27, 1964.

New York General Business Law, Article 29-I—The Storage of Household Goods:

§605. Short title

This article should be known and may be cited as the "truth-in-storage" act.
Added L.1979, c. 570, §1.

Effective Date. Section effective on the 90th day after July 10, 1979, pursuant to L.1979, c. 570, §2.

§606. Definitions

Whenever used in this article:

(a) Warehouseman means a person engaged in the business of storing goods for hire.

(b) Storage of household goods means goods stored by a consumer bailor which are used or

bought for use primarily for personal, family or household purposes.

(c) Consumer bailor means a natural person. Added L.1979, c. 570, §1.

Effective Date. Section effective on the 90th day after July 10, 1979, pursuant to L.1979, c. 570, §2.

§607. Required disclosures

1. No warehouseman shall accept household goods for storage from a consumer bailor unless prior to accepting the goods, the consumer bailor is furnished with a written storage agreement which shall be dated and signed by the consumer bailor and the warehouseman or his duly authorized agent, be written or printed in a size equal to at least ten-point bold type and which shall set forth the following information:

(a) Name and address of warehouseman and consumer bailor.

(b) Street address of warehouse where goods will be stored.

(c) The reasonably estimated monthly storage charge for the particular household goods to be stored expressed in dollars. The actual monthly charge shall not exceed the given estimate by more than ten percent.

(d) An itemization of other charges imposed or which may be imposed in connection with the storage, a description of each such charge, whether the charge is mandatory or optional, and the amount of each charge expressed in dollars. Where such charges can only be estimated, a reasonable estimate must be set forth and the actual charges shall not exceed such estimates by more than ten percent.

(e) An inventory by item number of all goods accepted for storage or of the packages containing them together with a notation of the condition of each of the goods accepted; a statement that the bailor should review the condition noted for each of the goods before they are picked up for storage to make sure that a proper description of the condition of each of the goods has been entered on the inventory; and a statement that the bailor before signing the storage agreement should note on it by item number any exception he may have as to the condition descriptions. The notation of the condition of the goods by the warehouseman or his agent shall be expressed in readily understandable terms.

(f) A statement of any limitation of damages limiting the amount of the warehouseman's liability in case of loss or damage of the goods setting forth a specific liability per article or item of value per unit of weight beyond which the warehouseman will not be liable; provided that if damages are so limited, a statement

shall be included that such liability may on the written request of the bailor at the time of signing such storage agreement or within a reasonable time thereafter be increased on part or all of the goods stored, in which event increased rates may be charged based on such increased valuation. The rates charged for an increased valuation shall be set forth and a pre-addressed request form to enable the bailor to request an increased valuation shall be provided.

(g) *Any other material terms and conditions of the storage transaction.*

2. Every storage agreement as required by this section shall include the business address and telephone number to be used by the consumer bailor in making inquiries concerning the storage transaction.

3. Every storage agreement as required by this section shall contain the following conspicuous notices:

Notice: The monthly storage charge and other charges stated in this agreement are either the actual or reasonably estimated charges you must pay. If the charges are estimated the final charges you will be required to pay may not exceed the estimate by more than ten percent.

Notice: Storage charges do not include any charges for moving your goods from your home

to the warehouse or from the warehouse to your home. (Emphasis added.)
Added L.1979, c. 570, §1.

§608. Unlawful detention of goods

1. Notwithstanding the provisions of section 7-209 of the uniform commercial code, no warehouseman shall have a lien on any household goods stored by him in a particular case where the charges demanded for storage are in excess of the charges permitted by this article.

2. It shall constitute an unlawful detention of goods for a warehouseman to refuse to surrender household goods stored by him for a consumer bailor upon payment by the consumer bailor of the storage charges permitted by this article.
Added L.1979, c.570, §1.

§609. Private right of action

1. Any consumer bailor damaged by an unlawful detention of his goods or any other violation of this article may bring an action for recovery of damages and the return of his goods. Judgment may be entered in an amount not to exceed three times the actual damages plus reasonable attorneys fees.

2. Nothing in this article shall be construed so as to nullify or impair any right or rights which

a buyer may have against a seller at common law, by statute or otherwise.
Added L.1979, c. 570, §1.

§610. Violation and penalties

Whenever there shall be a violation of this article, an application may be made by the attorney general in the name of the people of the state of New York to a court or justice having jurisdiction by a special proceeding to issue an injunction, and upon notice to the defendant of not less then five days, to enjoin and restrain the continuance of such violations; and if it shall appear to the satisfaction of the court or justice that the defendant has, in fact, violated this article, an injunction may be issued by such court or justice, enjoining and restraining any further violation, without requiring proof that any person has, in fact, been injured or damaged thereby. In any such proceeding, the court may make allowances to the attorney general as provided in paragraph six of subdivision (a) of section eighty-three hundred three of the civil practice law and rules, and direct restitution. Whenever the court shall determine that a violation of this article has occurred, the court may impose a civil penalty of not more than one thousand dollars for each violation. In connection with any such proposed application, the attorney general is authorized to take proof and make a determination of the relevant facts and to issue subpoenas in accordance with the civil practice law and rules.
Added L.1979, c. 570, §1.

Opposition

Office - Supreme Court, U.S.
FILED
DEC 28 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-1067

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

SMITH'S MOVING AND TRUCKING COMPANY and GEORGE G. SMITH, individually and as President of Smith's Moving and Trucking Company and on behalf of all others similarly situated,

Petitioners,

—v.—

DOROTHY SVENDSEN, individually, and on behalf of all others similarly situated,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

WESTCHESTER LEGAL SERVICES, INC.
By: Martin A. Schwartz, Of Counsel
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IN THE

SUPREME COURT OF THE UNITED STATES

No. 81-1067

SMITH'S MOVING AND TRUCKING COMPANY and GEORGE G. SMITH, individually and as President of Smith's Moving and Trucking Company and on behalf of all others similarly situated,

Petitioners,

-against-

DOROTHY SVENDSEN, individually and on behalf of all others similarly situated,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Dorothy Svendsen respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the decision of the New York Court of Appeals in this case.

PRELIMINARY STATEMENT

This case does not raise any federal question. No federal question was asserted in the complaint or argued in the courts below. No federal question was determined by the courts below. The sole question decided by the courts below is the state law issue whether the sale provision of New York's warehouseman's lien law, New York Uniform Commercial Code, §7-210(2), violates the Due Process Clause of Article I, §6 of the New York Constitution. Svendsen v. Smith's Moving and Trucking Co., __ N.Y.2d __ (1981), aff'g, 76 A.D.2d 504 (2d Dept. 1980). (3a-10a).*

The New York Supreme Court denied plaintiff-respondent's motion for summary judgment because it believed it unnecessary to determine the validity

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* References to the Appendix are denominated __a.

of section 7-210(2) of the New York Uniform Commercial Code. (6a-10a).* The court also ruled that "[a] class action is inappropriate under the circumstances herein." (16a).

The Appellate Division, Second Department, modified the order of the Supreme Court, granted summary judgment to the plaintiff, and entered a declaratory judgment that the contested New York statute violates the Due Process Clause of the New York Constitution because it fails to guarantee the owner of stored goods an opportunity for a hearing prior to a lien foreclosure sale. Svendsen v. Smith's Moving

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* The statement on page 3 of the petition for certiorari that "[t]he trial court granted petitioner warehouseman summary judgment on the constitutional issue on the authority of this Court's holding in Brooks v. Flagg, supra" has been acknowledged by petitioner to be erroneous. Letter of Petitioner's Counsel to the Clerk of the Court, December 9, 1981. The trial court neither granted summary judgment to respondents nor cited this Court's decision in Flagg Brothers v. Brooks, 436 U.S. 149 (1978).

and Trucking Co., 76 A.D.2d 504 (2d Dept. 1980). (6a-10a). The Appellate Division found that the decision in Sharrock v. Dell Buick-Cadillac, 45 N.Y.2d 152 (1978), in which the New York Court of Appeals held that the sale provision of the New York garageman's lien law violated the Due Process Clause of the New York Constitution, "is dispositive." Id. at 506. This Court's decision in Flagg Brothers v. Brooks, 436 U.S. 149 (1978), which upheld the warehouseman's lien law under the federal Constitution, did "not alter this result" because the Appellate Division

> "determination is necessarily based upon the due process clause of the New York State Constitution as construed by the [New York] Court of Appeals in Sharrock v. Dell Buick-Cadillac (supra)." Svendsen v. Smith's Moving and Trucking Co., supra at 507. (9a-10a)(emphasis added).

The New York Court of Appeals affirmed the order of the Appellate Division "for the reasons stated

in the Per Curiam opinion of that court (76 A.D.2d 504)." (3a). The decision of the New York Court of Appeals, like the decision of the Appellate Division, is based solely on the New York Constitution. (3a-5a).

In Point I, infra, plaintiff will demonstrate that this Court is without jurisdiction in this case because the decision of the New York Court of Appeals is based entirely on state law grounds. In Point II, infra, plaintiff will demonstrate that the second question presented for review is not properly before this Court because petitioners did not raise an impairment of contract claim in any of the courts below, and this question was not decided by the courts below. In any event, this question is frivolous since there was no contact between the parties in this case.

REASONS WHY THE WRIT SHOULD BE DENIED

I.

THIS COURT DOES NOT HAVE POWER TO REVIEW A STATE COURT DECISION BASED SOLELY ON STATE LAW GROUNDS.

This Court is without power to review a judgment of a State court that is based on an independent and adequate state law ground. Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562,566-568 (1977); Herb v. Pitcarin, 324 U.S. 117,125-126 (1945); Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935); Enterprise Irrigation District v. Farmers Mutual Canal Co., 243 U.S. 157,164 (1917); Stern and Gressman, Supreme Court Practice, §3.31, p.230-231. In Herb v. Pitcarin, supra, the Court stated that the reason for this rule

> "is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights." Id. at 125-126.

This principle applies with full force to the instant case because the decision of the court below is based entirely on state law grounds. "A classic instance of a judgment that is grounded on an independent and adequate state ground is one that declares a state statute invalid under the state constitution, without reference to or reliance on the federal Constitution." Stern and Gressman, Supreme Court Practice, §3.33, p.239. See, Aikens v. California, 406 U.S. 813,814 (1972) (Decision of State court under State Constitution "rested on an adequate state ground and the State's petition for writ of certiorari was denied."). "[B]y invoking a state constitutional provision, a state court immunizes its decision from review by this Court." Payton v. New York, 100 S.Ct. 1371,1387 (1980).

The New York Court of Appeals clearly had the power to provide plaintiff greater individual rights under the New York Constitution than this Court recognizes

under the federal Constitution. This Court has repeatedly recognized a state's "sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution." Pruneyard Shopping Center v. Robins, 100 S.Ct. 2035,2040 (1980). Accord, Minnesota v. Clover Leaf Creamery, 101 S.Ct. 715,722 n.6 (1981); Oregon v. Haas, 420 U.S. 714,719 (1975); Cooper v. California, 386 U.S. 58,62 (1967); Minnesota v. National Tea Co., 309 U.S. 551,556 (1940). Thus, the fact that the court below granted individual protections under its State Constitution that this Court had declined to grant under the Federal Constitution is consistent with principles of state sovereignty and does not raise any question of federal law.

Since the decision of the New York Court of Appeals was based solely on the New York State Constitution, it is not reviewable by this Court.

II.

THE SECOND QUESTION PRESENTED FOR REVIEW WAS NOT RAISED IN THE COURTS BELOW AND IS THUS NOT PROPERLY BEFORE THIS COURT.

The second question presented in the petition for certiorari attempts to raise the issue whether the decision of the court below impairs the obligation of contract in violation of Article I, Section 10 of the United States Constitution. This question was not raised in any of the courts below, and was not discussed in any of the decisions of the courts below. (3a-10a, 14a-16a).

Petitioners in the court below argued only that recent amendments to the New York General Business Law required the rejection of plaintiff's State Constitution claim, and it is this argument that was passed upon by the New York Court of Appeals. (4a). Since petitioners did not raise an impairment of contract claim in the courts below, and since the courts below did not rule

on this claim, it is not reviewable in this court.*

It is well "established that [this] Court will not decide federal constitutional issues raised here for the first time on review of state court decisions. . . . The Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions. . . ." Cardinale v. Louisiana, 394 U.S. 437,438 (1969). Accord, Carter v. Kentucky, 101 S.Ct. 1112,1121 (1981); Tacon v. Arizona, 410 U.S. 351,352 (1973); Hill v. California, 401 U.S. 797,805 (1971); Stern and Gressman, Supreme Court Practice, §3.30, p.230. The second question presented for review is thus not properly before this Court.

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* Even though the Appellate Division held the summary sale provision invalid under the New York Constitution, petitioners did not raise an impairment of contract claim in the New York Court of Appeals. This is thus not a case where the federal constitutional claim arose only after the decision of the highest court in the State.

In any event, the second question presented for review is frivolous. The decision of the court below referred "to the instant non-contracted situation. . . ." (4a. Accord, 7a). Since there was no contract in this case, there can be no impairment of contract. See, United States Trust Co. v. New Jersey, 431 U.S. 1,17 (1977)(". . . appellant's claim requires a determination that this repeal has the effect of impairing a contractual obligation.").

Moreover, petitioners are in error in arguing that the decision below "has extinguished a contractual right of extrajudicial sale. . . ." (Petition for Certiorari, p.5). The decision below does not deprive the warehouseman of the power to sell, but only requires that the bailor be afforded an opportunity for a hearing prior to sale. See Sharrock v. Dell Buick-Cadillac, 45 N.Y.2d 152, 166-167 (1978). State laws which "safeguard vital interests of [the] people" do not unconstitutionally impair private contracts because "[n]ot only are existing laws read into

contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order." Home Building & Loan Ass'n. v. Blaisdell, 290 U.S. 398,434-435 (1974). Accord, Allied Structural Steel Co. v. Spannaus, 438 U.S. 234,241 (1978).

CONCLUSION

For the foregoing reasons, plaintiff-respondent respectfully prays that the petition for certiorari be denied.

Dated: December 21, 1981
White Plains, New York

Respectfully submitted,

WESTCHESTER LEGAL SERVICES, INC.
By: Martin A. Schwartz, Of Counsel
Virginia Knaplund, Of Counsel
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Office-Supreme Court, U.S.
FILED
DEC 28 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. 81-1067

SMITH'S MOVING AND TRUCKING COMPANY and GEORGE G. SMITH, individually and as President of Smith's Moving and Trucking Company and on behalf of all others similarly situated,

Petitioners,

-against-

DOROTHY SVENDSEN, individually and on behalf of all others similarly situated,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The respondent in the above captioned action asks leave to file her Motion to Affirm pursuant to Rule 46 in forma pauperis.

The affidavit of respondent in support of this motion is attached hereto.

Leave to proceed in forma pauperis was not sought in any court below.

WESTCHESTER LEGAL SERVICES, INC.
By: Martin A. Schwartz, Of Counsel
Virginia Knaplund, Of Counsel
Counsel for Respondent
Office & P.O. Address
171 East Post Road
White Plains, New York 10601
Tel: (914) 949-4797

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. 81-1067

SMITH'S MOVING AND TRUCKING COMPANY and GEORGE G. SMITH, individually and as President of Smith's Moving and Trucking Company and on behalf of all others similarly situated,

Petitioners,

-against-

DOROTHY SVENDSEN, individually and on behalf of all others similarly situated,

Respondent.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

I, DOROTHY SVENDSEN, being first duly sworn according to law, depose and say that I am respondent in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to the cost of prosecuting the appeal are true.

1. Are you presently employed?

No.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends or other source?

I received approximately $6,000.00 for seven (7) months employment as an Office Assistant from February to September 1981.

3. Do you own any cash or checking or savings account?

Under $25.00

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

No.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

None.

I understand that a false statement to any question in this affidavit will subject me to penalties for perjury.

Dorothy Svendsen

DOROTHY SVENDSEN

Sworn to before me this
18th day of December, 1981.

Virginia Knaplund

VIRGINIA KNAPLUND
Notary Public, State of New York
No. 4[illegible]695
[illegible]ed in Westchester County
[illegible] Expires March 30, 1983

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. 81-1067

SMITH'S MOVING AND TRUCKING COMPANY and GEORGE G. SMITH, individually and as President of Smith's Moving and Trucking Company and on behalf of all others similarly situated,

Petitioners,

-against-

DOROTHY SVENDSEN, individually and on behalf of all others similarly situated,

Respondent.

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

STATE OF NEW YORK)
COUNTY OF WESTCHESTER) SS:

MARTIN A. SCHWARTZ, ESQ., being duly sworn, deposes and says that:

1. I am an attorney duly admitted to practice before this Court. I am associated with Westchester Legal Services, Inc., attorney for respondent in the above entitled appeal. I make this affidavit in support of respondent's motion to proceed in forma pauperis.

2. On information and belief, the respondent in this case was a recipient of public assistance when this action was commenced, and has

received public benefits during various periods of this litigation. She has been represented throughout this action by Westchester Legal Services, Inc., a non-profit organization which exists for the purpose of providing legal representation in civil matters to indigents.

WHEREFORE, your deponent respectfully prays that this Court grant respondent's motion to proceed in forma pauperis.

Martin A. Schwartz

MARTIN A. SCHWARTZ

Sworn to before me this
18th day of December, 1981.

Kathleen S Jones

KATHLEEN SUZANNE JONES
Notary Public, State of New York
No. 60-4614206
Qualified in Westchester County
Commission Expires March 30, 1983

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. 81-1067

SMITH'S MOVING AND TRUCKING COMPANY and GEORGE G. SMITH, individually and as President of Smith's Moving and Trucking Company and on behalf of all others similarly situated,

Petitioners,

-against-

DOROTHY SVENDSEN, individually and on behalf of all others similarly situated,

Respondent.

STATE OF NEW YORK)
COUNTY OF WESTCHESTER) SS:

Meryl Goldin, being duly sworn, deposes and says that:

I am over the age of 18 years and I am not a party to this action and I reside at Purchase, NY 10577.

That on the day of December, 1981, deponent served the annexed Motion for Leave to Proceed In Forma Pauperis on Alvin Altman, Esq., attorney for Petitioners in this action at 888 Seventh Avenue, New York, New York 10106; the address designated by said attorney for that purpose, by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Meryl Goldin

Meryl Goldin

Sworn to before me this
18th day of December, 1981.

Martin A. Schwartz

MARTIN A. SCHWARTZ
Notary Public, State of New York
No. 03-3555455
Qualified in Bronx County
Certificate filed in New York County
Commission Expires March 30, 1983